



CITY OF HAYWARD

AGENDA REPORT

AGENDA DATE 03/16/99

AGENDA ITEM _____

WORK SESSION ITEM WS#3

TO: Mayor and City Council

FROM: City Attorney

SUBJECT: Land Use Issues and the Decision Making Process

RECOMMENDATION:

It is recommended that the City Council review and comment upon the following information.

Introduction:

Decisions and policies pertaining to local land uses are some of the most frequent and important matters to come before the City Council. While municipalities have historically enjoyed a broad power to regulate the use and development of their land, it is nevertheless a limited power. The state and federal constitutions, court decisions and legislation each impose restrictions on the scope of the City's land use powers. This report will focus on legal trends and developments pertaining to regulatory takings, as well as concerns regarding the decision-making process in land use matters. An update will also be provided on changes to the Subdivision Map Act and CEQA.

Discussion:

A. LAND USE LAW DEVELOPMENTS

1. OVERVIEW OF REGULATORY TAKINGS

Both the United States and California Constitutions require a governmental agency to pay just compensation to a property owner whose property is acquired, or taken, for a public purpose. The most common application of this requirement is when the City uses its power of eminent domain to acquire private property. In addition, the just compensation requirement may apply to the adoption or application of a land use regulation which "goes too far" and results in a virtual taking of the property. This type of taking is referred to as a "regulatory taking." Generally speaking, the application of a land use regulation to a particular property becomes a taking if the regulation either (1) does not substantially advance legitimate state interests or (2) denies an owner economically viable use of his or her land. (*Agins v. City of Tiburon* 447 U.S. 255 (1980).)

In 1987, the United States Supreme Court decided the case of *First English Evangelical Lutheran Church v. County of Los Angeles* 482 U.S. 304 (1987), which held that a governmental agency must pay monetary damages for both temporary and permanent takings of private property which result from a governmental regulation. Prior to the *First English* case, a property owner could not obtain monetary damages for a regulatory taking, but only seek to have the regulation invalidated. As a result of this holding, the number of lawsuits alleging a regulatory taking and temporary taking damages has increased dramatically. Property rights advocates continue to lobby legislatures and urge courts to expand the regulatory takings doctrine. Therefore, the risk of regulatory taking claims remains a continuing area of concern to all local governments.

a. "Nexus" and "Rough Proportionality"

It is impossible for anyone who is even remotely involved in land use issues and decisions to escape from the ever-present buzzwords "nexus" and "rough proportionality." Unfortunately, an understanding of just what these terms mean and how they are applied is not so common. Some background information is helpful.

In addition to regulations which control generally how land may be developed, local agencies exact fees and dedications in connection with property development pursuant to their police power to protect the health, safety and welfare of the public. A "dedication" typically involves a requirement imposed in connection with real property development resulting in the transfer of a property interest (for example, an easement). A "fee" exaction typically involves a monetary charge to pay for measures to alleviate the impact of the proposed development. Impact fees are commonly used to finance the incremental cost of improvements to those public facilities and services necessitated by new development.

The major legal issue involving exactions is not whether they may be required. Rather, it is the reasonableness of the exaction in kind and amount. In general, regulations, fees and dedications must not be so restrictive as to cause a "taking" of the developer's property without just compensation. As noted earlier, the application of a land use regulation to a particular property becomes a taking if the regulation either (1) does not substantially advance legitimate state interests or (2) denies an owner economically viable use of his or her land.

In considering the first prong of this test, recent courts have looked to whether the stated purpose of a regulation is actually met by the exaction or condition. In the case of *Nollan v. California Coastal Commission* 483 U.S. 825 (1987), the United States Supreme Court ruled that a condition that requires a dedication to the public of an interest in private real property is constitutionally valid only if an "essential nexus" exists between a legitimate state interest and the condition imposed. In other words, there must be a connection between the impact created by the project, and the ability of the condition to address that impact.

The *Nollan* case did not discuss the required degree of connection between the condition imposed and the projected impacts of the projects. This issue was left open until *Dolan v. City of Tigard* 512 U.S. 374 (1994). In *Dolan*, the Court held that a development exaction that mandates a public dedication of an interest in land must be “roughly proportional” to the projected impact caused by the development. Although “no precise mathematical calculation” is required to show the rough proportionality, the agency must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.

Dolan’s application however, is limited to adjudicative decisions imposing property exactions as a condition on particular developments. For general legislative acts involving a range of properties, such as general zoning regulation, the standard remains that a regulation must substantially advance a legitimate government regulation.

In addition to these case-law created requirements surrounding exactions and regulations, the state has enacted the “Mitigation Fee Act” (also referred to as “AB 1600”), which applies to public facility fees imposed on a broad class of projects by legislation of general applicability, and fees imposed on a project specific basis. (Govt. Code § 66000 *et seq.*) The Mitigation Fee Act requires local public agencies to identify the purpose of the fee and the use to which the fee will be put. The public agency must also explain why there is a reasonable relationship between the fee and the development on which it is imposed; the agency must explain the relationship between the public facility financed by the fee and the type of development project against which the fee is imposed.

In summary, a dedication or fee is valid when all of the following conditions are met:

- The agency is acting within its police power or some other statutory authority
- The condition substantially furthers a legitimate governmental interest
- The condition furthers the same governmental interest advanced for imposing it (the “essential nexus” test)
- The condition has the required degree of connection, or nexus (the “rough proportionality” test)
- The owner is not denied all economically viable use of the property at issue

This area of law is in a constant state of flux, as individual property rights advocates push to limit the ability of government to regulate private property. The clash of public versus private property interests is being played out in Congress and state legislatures, as well as the courts. Pending cases in the Supreme Court should yield some further guidance in this area in the near future.

b. CEQA Considerations

Whenever any type of land use project is undertaken, state law requires that a review of the project be conducted specifically to assess whether it might have any significant negative

impacts on the environment. The requisite level of review can vary from project to project, with certain projects being exempt from review, some requiring only an initial study and statement that it will have no adverse impact ("negative declaration"), and some requiring a comprehensive review in the form of an environmental impact report ("EIR").

If the environmental review identifies any significant impacts, a local agency must take steps to mitigate the impacts. Such mitigation often takes the form of a project condition designed to eliminate or address the negative environmental impact. If a fee or dedication is imposed as a mitigation measure, the agency should look to the CEQA documentation for the project for substantiation of the need for the exaction and the project's role in creating that need.

2. SUBDIVISION MAP ACT UPDATE: POTENTIAL DELEGATION OF FINAL MAP DETERMINATIONS

A 1998 amendment to the Subdivision Map Act which may impact the City of Hayward authorizes the City Council to adopt an ordinance delegating the authority for action on final maps to the City Engineer or other designated official. As required by the Subdivision Map Act amendment, any ordinance delegating authority for final map approvals must contain the following elements:

- (1) The City Council will be provided notice when a developer asks the City to approve a final map.
- (2) The designated official must approve or disapprove the final map within ten 10 days after the first City Council meeting after the mailing of notice to the City Council and interested parties of the final map application.
- (3) The City Clerk, or other City official or employee will be required to mail notice of any pending application for final map approval to interested parties.
- (4) The designated official's action on the final map will be subject to appeal to the City Council.
- (5) Any delegation ordinance must also provide for the periodic City Council review of the final map delegation authority.

A proposal to delegate the authority to act on final map submissions will be presented to City Council within the next few months. The proposed delegation ordinance will accompany the comprehensive Zoning Ordinance amendments. There are no change proposed to the current procedure for the approval of tentative maps, including vesting tentative maps, which will continue to be reviewed by either the Planning Commission or the City Council.

3. CALIFORNIA ENVIRONMENTAL QUALITY ACT ("CEQA") CHANGES

There are no major amendments to the CEQA statute, and there are no recent cases which impose major changes on the interpretation of CEQA requirements. However, a number of State CEQA Guidelines were revised in 1998. Many of the changes are of a technical nature and are outside the scope of this report. The following is a summary of revisions which will likely affect the City of Hayward's environmental review procedures. These include several new categorical exemptions, clarification of significant effect thresholds, guidance on the use of tiered environmental documents and mitigation requirements.

- (1) New Categorical Exemptions. The CEQA statute contains a number of statutory exemptions from CEQA requirements. The term categorical exemption refers to categories of projects or actions which the Governor's Office of Planning and Research has deemed to have an insignificant environmental effect. Hence, a project included within a statutory or categorical exemption does not require the preparation of a Negative Declaration or an Environmental Impact Report (EIR). There are several new categorical exemptions; these include the following project categories.
 - (a) Infill Developments. Small infill developments on sites of less than five acres, which can be adequately served by all required utilities and public services and are surrounded by urban development, are now designated as a Class 32 exemption, if the development is consistent with the General Plan and the Zoning Ordinance, is not located on an environmentally sensitive site, and project approval will not have significant effects on traffic, noise, air quality, or water quality. (Guideline 15332.)
 - (b) Hazardous Waste and Hazardous Materials Cleanup. Small projects costing \$1 million or less, which prevent, minimize, stabilize, mitigate or eliminate the release or threatened release of a hazardous material or waste, are now designated as a Class 30 exemption, as long as there is no use of incineration or high temperature thermal treatment techniques. (Guideline 15330.)
- (2) Significant Effect Threshold. The threshold for determining when an environmental effect may be significant is important because potentially significant environmental effects must usually be analyzed in an Environmental Impact Report (EIR). The standard for determining the significance of an environmental effect in certain instances has been clarified:
 - (a) An environmental effect is not significant if it falls below an environmental threshold established by a state or federal agency with jurisdiction over the subject environmental resource. (Guideline 15064(i).)
 - (b) In addition, the City of Hayward may now establish local thresholds of significance for determining when a particular environmental effect will be

significant. An example of this could be the development of a traffic or parking impact threshold which will be uniformly applied to all similar developments. (Guideline 15064.7.)

- (c) Cumulative Effect. A project's incremental effect is not significant if its effect is not "cumulatively considerable." This standard means that a project will not have a cumulatively significant effect if the project's incremental effect will be rendered insignificant through the adoption of mitigation measures identified in a mitigated negative declaration. (Guideline 15064(i).)
- (3) EIRs. The Guidelines have been updated to incorporate case law requirements for EIRs concerning discussions of mitigation measures, project alternatives and cumulative effects.
- (a) Mitigation Measures. All proposed mitigation measures must be consistent with applicable constitutional requirements. The Guidelines now specify that these include the "essential nexus" and "rough proportionality" requirements of the *Nollan-Dolan* cases. In addition, if a mitigation measure cannot be legally imposed because of the absence of such nexus, it is sufficient for an EIR to refer to the mitigation measure and explain why such measure cannot be lawfully imposed on the project. (Guideline 15126.4.)
 - (b) Project Alternatives. Additional guidance is provided on the existing requirement that project alternatives must be discussed in an EIR, including the alternative of project development at an alternative location and the "no project" alternative. (Guideline 15126.6.)
 - (c) Cumulative Effect. The Guidelines now specify standards for determining when the incremental effect of a project is "cumulatively considerable." (Guideline 15130.)
- (4) Tiering. This term refers to the use of an EIR prepared for an earlier plan, policy or program for a later implementation or related action. Some examples of the use of tiered environmental documents are: the program EIR certified for the South of 92 Specific Plan, and the EIR certified in conjunction with the recent expansion of the Downtown Hayward Redevelopment Project, which can also be used to satisfy CEQA review requirements for later implementation actions, such as specific projects in such areas. The revised Guideline continues to encourage the use of tiered EIRs, where appropriate. (Guideline 15152.)
- (5) Mitigation Monitoring. A new Guideline discusses the development and implementation of mitigation monitoring requirements. The City may choose to either adopt a mitigation monitoring program which will be implemented by periodic inspection by City staff, or mitigation reporting requirements which the developer must

comply with, or both. The City is also encouraged to adopt standardized mitigation monitoring and reporting policies. (Guideline 15097.)

B. THE DECISION MAKING POWER

Because land use decisions and policies implicate constitutionally protected property rights, it is imperative that they be made in a fair and deliberate manner. The following concerns lend a framework to the decision making process.

1. FAIR HEARING REQUIREMENTS

a. Background

There are basically three types of actions the City Council takes in conjunction with land use matters. These are legislative, adjudicative and ministerial actions. Legislative actions are enactments by the Council which establish laws, standards and policies governing local development. Primary examples of legislative action includes the adoption of general and specific plans, zoning ordinance amendments, and rezonings. Adjudicative actions are those discretionary permit activities whereby individual development projects are considered for approval and imposition of conditions, pursuant to legislatively approved laws, standards, policies and plans. Examples of adjudicative actions include zoning permit approvals and tentative subdivision map approvals. Ministerial actions are those mandatory, non-discretionary activities which must be approved if certain standards and conditions have been met. Approval of final subdivision maps and issuance of occupancy permits are examples of these.

It is important to distinguish between the various types of actions because certain procedural requirements are legally required for each of the categories. For example, while all three types of actions require some notice to interested persons, adjudicative actions, which are also called quasi-judicial actions or administrative actions, demand more stringent requirements pertaining to due process. Findings are required in adjudicatory land use matters, and a city abuses its discretion when it fails to make such findings. The initiative and referendum process applies only to legislative acts. In addition, the standard of review a court will use when an action is challenged depends upon what type of action -legislative, adjudicative or ministerial - it is.

Basic fairness and notice requirements govern all matters before the Council. Many of these concerns are addressed by the Brown Act. This report, however, will focus on the requirements pertaining to adjudicatory proceedings. Requirements are heightened for these quasi-judicial matters because they have the potential to affect substantial and significant property rights of individuals.

Both federal and state constitutions provide that the government may not deprive any person of property without due process of law. Due process principles require reasonable notice and opportunity to be heard before governmental deprivation of a significant property interest by an adjudicative decision. (*Horn v. Court of Ventura* (1979) 24 Cal.3d 605.) There is no precise formula that must be followed under due process principles, rather the particular interests at issue must be considered in determining what kind of notice and hearing is appropriate. Due process generally requires consideration of (a) the private interest affected, (b) the risk of erroneous deprivation of such interest through procedures used and the value of additional procedural safeguards, (c) the value of informing individuals of the nature, grounds and consequences of the action and enabling them to present their side of the story before a responsible government official, and (d) the governmental interest, including the function involved and the fiscal and administrative burdens that additional or substitute procedures would entail. (*Mohilef v. Janovici* (1996) 51 Cal.4th 267.)

For many adjudicatory actions, the specific type of notice required is set forth by statute or ordinance. Generally, notice must be given to the public at large, the individuals whose property might be affected, and other local agencies that might also be affected.

When a noticed hearing is required, certain procedural safeguards attach to the hearing. The local agency is required to adopt rules or regulations pertaining to the consideration of the issue. In land use matters, these rules often consist of the zoning ordinance and other policies which establish development parameters. A written staff report describing the action, as well as a recommendation and the basis for the recommendation should be prepared and made available to the applicant and public before the hearing. The hearing must provide an opportunity for the applicant to address the decision maker and respond to any issues raised by staff. Although an applicant must be given an opportunity to speak, courts have concluded it is permissible to impose time limits upon oral presentations in view of the heavy case load of agencies and the applicant's right to unlimited written submissions.

Formal rules of evidence or procedure applicable in judicial actions and proceedings do not apply in land use proceedings, except to the extent that a city might adopt them as a local rule. Due process does not necessarily require live testimony or cross-examination in quasi-judicial land use matters. A city council, however, may only act upon the information presented to it at the hearing, and not upon independent information or evidence taken outside the hearing. In the event a member of council has obtained independent evidence, such as observations based on a field trip to the site or information learned from a communication with the applicant, the council member must disclose the circumstances and information to the council and applicant at the time of the hearing.

Finally, due process requires that a record of the hearing and all of the documents considered by the council be made and maintained in the event judicial review of the decision is necessary. A copy of any item received by the council must be submitted to the City Clerk so that it can be included in the record on the issue.

b. Participation by the Council Members

Due Process requires that a land use hearing and decision be made in a fair manner. Thus, if one or more members of the decision-making body are biased or otherwise have improper motives for their decision, it may be claimed that due process has been violated. There are several areas of law to be considered when determining whether a council member can participate in a decision in a fair and unbiased manner. The Political Reform Act sets forth rules and regulations designed to prohibit a council member from participating in a decision when he or she has, or might have, a financial interest in the outcome of the decision. Other statutes apply to situations where an official has a contractual interest in a matter. In addition, there is a body of law dealing with personal bias, and whether and under what circumstances such might taint the impartiality of the process.

2. FINDINGS

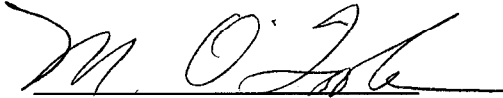
"Findings" are written explanations of why, legally and factually, a public entity is making a particular decision. Since 1974, when the landmark case of *Topanga Assn. for A Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, was decided, local agencies have been required to adopt findings whenever they act in an adjudicatory manner. As the *Topanga* court noted, findings are necessary because they provide a framework for making decisions, assist the applicant (and in some cases a reviewing court) in bridging the analytic gap between the raw evidence and the ultimate order or decision, induce the administrative body to draw legally relevant sub-conclusions supportive of its ultimate decision, and facilitate orderly analysis and minimize the likelihood that the agency will randomly leap from evidence to conclusion.

In many instances, the findings that need to be made in conjunction with specific development approvals (or denials) are set forth in either statutes or ordinances. Planning and zoning laws, along with the Subdivision Map Act, contain a variety of rules which expressly require certain findings with regard to specific actions. For example, when considering whether or not to grant an application for a conditional use permit, the Hayward Municipal Code mandates that certain findings be made -- that the proposed use is desirable for the public convenience, that it will not impair the character or integrity of the zoning district, that it will not be detrimental to public health, safety or welfare, and that it is consistent with the general policies plan and applicable city policies. Each of these findings must be made in writing, and must state not just a general conclusion that they are met, but must contain facts based on the evidence that support the conclusion. In addition to those findings required by statute or ordinance, findings must be made when an agency imposes individualized conditions upon a development approval.


In order to be sufficient, findings must be supported by substantial evidence in the record before the Council, and they must be relevant to the ultimate decision. Good findings demonstrate how requirements have been met by reciting all relevant facts in the administrative

record which support particular conclusions. Findings that are merely a recitation of statutory requirements are insufficient, as are boilerplate or conclusory findings. A proper finding will support the reasonableness of the agency's action and provide a defense to a due process, equal protection or takings challenge. Moreover, a finding may provide the basis for interpreting an agency's intent in the event a dispute arises concerning the correct interpretation or application of a particular enactment or approval.

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